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Costco Wholesale Corporation

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

IN RE: CATHODE RAY TUBE (CRT)  
ANTITRUST LITIGATION

Master File No. 3:07-cv-05944-SC  
MDL No. 1917

This document relates to:

Case No. 3:11-06397-SC

COSTCO WHOLESALE CORPORATION,

Plaintiff,

v.

HITACHI, LTD., et al.,

Defendants.

**DECLARATION OF ERIC J. WEISS  
IN SUPPORT OF COSTCO'S  
OPPOSITION TO THE PHILIPS  
DEFENDANTS' MOTION TO  
COMPEL ARBITRATION**

1 I, Eric J. Weiss, declare as follows:

2 1. I am an attorney with Perkins Coie LLP, counsel for Plaintiff Costco Wholesale  
3 Corporation (“Costco”). I am admitted to practice law in the states of Wisconsin, Illinois, and  
4 Washington and am admitted to appear *pro hac vice* in this action pursuant to Pretrial Order No.  
5 1, Dkt. 230 (Apr. 4, 2008). I am over the age of 18 and competent to testify to the matters in this  
6 Declaration, which is based on my personal knowledge.

7 2. Attached as **Exhibit A** is a true and correct copy of an email, dated October 15,  
8 2013, from Patrick Clayton, counsel for the Indirect Purchaser Parties (“IPP”), confirming that  
9 the IPPs sent to the defendants on February 19, 2010, a copy of the transactional data that Costco  
10 produced on February 18, 2012, in response to an IPP subpoena.

11 3. Attached as **Exhibit B** is a true and correct copy of Defendants Philips Electronics  
12 North America Corporation and Toshiba America Electronic Components, Inc.’s First Set of  
13 Interrogatories to Plaintiff Costco Wholesale Corporation, served on May 15, 2012.

14 4. Attached as **Exhibit C** is a true and correct copy of Defendants Philips Electronics  
15 North America Corporation and Toshiba America Electronic Components, Inc.’s First Set of  
16 Request for Production to Plaintiff Costco Wholesale Corporation, served on May 15, 2012.

17 5. Attached as **Exhibit D** is a true and correct copy of Costco Wholesale  
18 Corporation’s Answers and Objections to Philips Electronics North America Corporation and  
19 Toshiba America Electronic Components, Inc.’s First Set of Interrogatories, served on August 17,  
20 2012.

21 6. Attached as **Exhibit E** is a true and correct copy of Costco Wholesale  
22 Corporation’s Responses and Objections to Philips Electronics North America Corporation and  
23 Toshiba America Electronic Components, Inc.’s First Set of Request for Production, served on  
24 August 17, 2012.

25 7. On August 17, 2012, Costco served its objections and responses to the  
26 aforementioned discovery requests to counsel for the Philips Defendants. That same day, Costco  
27 also sent to counsel for the Philips Defendants via an FTP site Costco-CRT-00001, which  
28 contained Costco’s production of CRT transactional data. Attached as **Exhibit F** is a true and

1 correct copy of the August 17, 2012, email with instructions for downloading the transactional  
2 data.

3 8. Included within Costco's production was the file "Vendor Names.xlsx," which is a  
4 spreadsheet that lists vendors that sold Costco products containing cathode ray tube ("CRTs")  
5 during conspiracy. One of the vendors listed in the spreadsheet is "Philips Consumer  
6 Electronics," a division of defendant Philips Electronics North America Corporation. A  
7 preliminary review of the transactional data shows that the Philips Defendants sold to Costco at  
8 least \$355 million worth of CRT Products during the conspiracy.

9 9. Over the course of the next five months, counsel for Costco and the Philips  
10 Defendants participated in no fewer than four telephonic meet-and-confers and routinely emailed  
11 one another about the Philips Defendants' discovery requests. The parties initially reached a  
12 mutual understanding to work toward an agreement in which Costco would produce documents  
13 responsive to Defendants' requests based on a review of files from an agreed upon list of  
14 custodians, filtered by keyword search terms. The Philips Defendants and Costco exchanged and  
15 negotiated proposed search terms and on several occasions discussed options for reducing costs  
16 and time in producing those documents. As a part of those meet-and-confers and email  
17 exchanges, Costco responded to additional discovery requests from the Philips Defendants,  
18 producing a warehouse reference list, organizational chart, and responses to additional inquiries  
19 regarding transactional data, warehouse region codes and descriptions, and supplemental  
20 transactional data. Attached as **Exhibit G** are true and correct copies of a series of emails and  
21 letters between counsel for Costco and the Philips Defendants regarding the ongoing discovery  
22 discussions and production.

23 10. On October 17, 2012, counsel for the Philips Defendants informed me that the  
24 defendants wanted to depose a Costco witness pursuant to Rule 30(b)(6) in an expeditious manner  
25 because the defendants hoped to include that deposition in their upcoming response to the IPPs'  
26 motion for class certification. On October 18, 2012, counsel for the Philips Defendants sent me  
27 an list of draft topics for the deposition and commented that "time is of the essence." Attached as  
28

1 **Exhibit H** is a true and correct copy of an October 18, 2012, email from counsel for the Philips  
2 Defendants to me.

3 11. Costco agreed to make its witness available for a deposition on November 16,  
4 2012. The IPPs thereafter requested from the defendants a continuance in light of the last-minute  
5 notice of the deposition, and Special Master Legge continued the deposition to December 7, 2012.  
6 On that day, the defendants deposed Geoff Shavey, a former Assistant General Merchandise  
7 Manager and buyer of consumer electronics for Costco. Attached as **Exhibit I** is a true and  
8 correct copy of the Notice of Deposition to Costco.

9 12. On January 10, 2013, in what the Philips Defendants described as “a pivot in our  
10 discussions regarding Costco’s document production,” counsel for the Philips Defendants  
11 directed Costco to immediately suspend its ongoing document-production efforts and instead  
12 search for and produce “all Vendor Agreements, or any other agreements containing an  
13 arbitration provision, that it had in place with any Defendant relating to the purchase of products  
14 incorporating CRTs during the 1995-2007 time period.” The Philips Defendants claimed to have  
15 heard for the first time at the deposition of Geoff Shavey “that Costco has similar Vendor  
16 Agreements with all suppliers.” Attached as **Exhibit J** is a true and correct copy of the January  
17 10, 2013, email and letter sent by counsel for the Philips Defendants to Costco. Until that point,  
18 the Philips Defendants had never indicated to Costco that they were considering moving to  
19 compel arbitration.

20 13. On January 18, 2010, I informed the Philips Defendants that Costco would  
21 produce any such vendor agreements but explained that “if any Defendants signed contracts with  
22 Costco containing arbitration provisions, those Defendants presumably maintained their own  
23 copies of those contracts and have had them available to review and consult ever since entering  
24 into them.” I also explained that to the extent any such contracts existed, “Defendants have  
25 waived any opportunity to arbitrate with Costco” because those “Defendants’ decision to proceed  
26 in the MDL forecloses any opportunity to arbitrate now.” Attached as **Exhibit K** is a true and  
27 correct copy of the January 18, 2013, letter I sent to counsel for the Philips Defendants. Costco  
28 produced the vendor agreements on February 11, 2013.

